Supreme Court, U. S.
FILED
OCT 24 1975
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-6211

KATHRYN FRANCES HAND, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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---

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

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The Petitioner, Kathryn Frances Hand, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, sitting *en banc,* entered on July 28, 1975. Petition for Rehearing was denied on September 26, 1975.

## OPINION BELOW

The *en banc* opinion of the Court of Appeals is reported at 516 F.2d 472 (5th Cir. 1975). The panel opinion is reported at 497 F.2d 929 (5th Cir. 1974). Both opinions, and the order denying petition for rehearing, and the judgment appear in the Appendix to this Petition at Page 2A-32A.

## JURISDICTION

Petitioner's time for filing this Petition ends on October 28, 1975. This Petition was timely filed by that date. The Court's jurisdiction is invoked pursuant to Title 28 U.S.C. § 1254(1).

## QUESTIONS PRESENTED

1. Whether the search and seizure in this case is excused from the Fourth Amendment requirement of a search warrant because of "exigent circumstances".

2. Whether the Petitioner may be convicted and imprisoned for violation of a statute which had not been enacted at the time of the offense.

3. Whether the utter and total failure of the proceedings to contain any evidence on the essential element of jurisdiction constitutes plain error under Rule 52(b), F.R.Crim.P.

4. Whether the trial court's omission to submit to the jury the essential element of jurisdiction constitutes plain error under Rule 52(b), F.R.Crim.P.

## STATUTORY PROVISIONS INVOLVED

*Fourth Amendment to the United States Constitution:*

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.



*Title 18 U.S.C. Section 657 (as amended on October 19, 1970):*

> Whoever, being an * * * employee of * * * any lending, [or] * * * credit * * * corporation or association authorized or acting under the laws of the United States or any institution the accounts of which are insured * * * by the Administrator of the National Credit Union Administration * * * embezzles, * * * any moneys, * * * belonging to such institution, or pledged or otherwise intrusted to its care, shall be fined not more than $5,000 or imprisoned not more than five years, or both; * * *."

*Title 18 U.S.C. Section 657 (prior to October 19, 1970 amendments):*

> Whoever, being an * * * employee of * * * any lending, [or] * * * credit * * * corporation or association authorized or acting under the laws of the United States * * * embezzles, * * * any moneys, * * * belonging to such institution, or pledged or otherwise intrusted to its care, shall be fined not more than $5,000 or imprisoned not more than five years, or both; * * *."

*Rule 52, Federal Rules of Criminal Procedure:*

> (a) * * *
>
> (b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

## STATEMENT OF THE CASE

This case involves a warrantless search of Petitioner's purses by a federal agent, who suspected her of criminal violations and who previously caused her suspension from employment due to irregularities in the cash ac-

counts. Incriminating documents were found in the purses and were introduced into evidence at the trial over proper objection.

The Petitioner, Mrs. Hand, was the bookkeeper and office manager for ILA 1351 Federal Credit Union. During an audit of the credit union accounts, irregularities were uncovered in the way cash was handled, and Mrs. Hand admitted to the federal agent that she had "lapped" the accounting records to cover up shortages of cash because she did not want to be blamed for the shortages. She denied embezzling any money. She further stated that she did not know who was responsible for the shortages, and it is uncontested that the money could have been taken by several persons other than herself who had full and free access to the cash. Nonetheless, the federal agent (who was a senior credit union examiner with investigative powers) caused the Board of Directors to suspend Mrs. Hand from her employment and to banish her from the premises. When she left the premises, she was not permitted to take any of her personal possessions with her, but the personal possessions were not seized by the federal agent at that time; they were left in or about Mrs. Hand's desk and file cabinet. Her personal possessions which she was required to leave at the credit union office included several purses together with books and scarves.

The *only evidence in the record* concerning the facts leading up to the warrantless search and seizure of her purses is quoted as follows:

> "Q. [by the prosecutor] Did you have any conversation with Mrs. Hand regarding the return of some personal property?
>
> A. [by the federal agent] I was aware that she wanted to pick up some personal property. I can't recall if she spoke to me directly or through Mrs. Westergreen, but I was aware that she had planned to send someone by the credit union to pick up several purses, and I think maybe some books and scarves, and so forth." (Appendix, Pages 40-41)



At that point in time, the federal agent gathered up Mrs. Hand's purses and searched them. In the purses he found not only her personal identification but also numerous "cash received vouchers" showing monies deposited to the credit union. These records were used to form the basis of the ten counts of the indictment, and were introduced into evidence against Mrs. Hand at the trial. The federal agent admitted that at the time he searched and seized Mrs. Hand's purses, he suspected her of criminal violations and had caused the Board of Directors to suspend her from employment. He also admitted that the only other female employee of the credit union was present when he searched and seized the purses. (Appendix, Pages 45-46). The record is clear that the other female employee did not claim those purses, and that the federal agent certainly knew at the time he searched and seized the purses that they belonged to Mrs. Hand.

Mrs. Hand was indicted in ten substantive counts for violations of 18 U.S.C. §657. Each count alleged embezzlement from a *federally insured* credit union. The indictment did *not* allege federal incorporation of the credit union. The only difference between the counts was the dates of the alleged offenses and the amounts allegedly embezzled. (Appendix, Page 33a). The jury convicted Mrs. Hand on each count at the conclusion of a two day trial.

It is agreed and uncontested in this case that the prosecution introduced absolutely no evidence whatsoever, direct or circumstantial, that the accounts of the credit union were insured as alleged in each count of the indictment. Federal insurance of the accounts was the jurisdictional basis for federal court prosecution. The prosecution did introduce into evidence (without objection) the *charter* of the credit union, which did prove that it was a *federally incorporated* institution, although that basis for the federal court's jurisdiction was not alleged in the indictment, and was not otherwise mentioned during the trial.

It is also uncontested that the District Judge did not submit to the jury *any jurisdictional* element of the offense, and that neither the prosecution nor the defense objected to this defect in the jury charge.

## REASONS FOR GRANTING THE WRIT

### I.

### THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT AND OF OTHER COURTS OF APPEALS AS TO THE "EXIGENT CIRCUMSTANCES" EXCEPTION TO THE REQUIREMENT FOR A SEARCH WARRANT.

In affirming Petitioner's conviction, the Court of Appeals made a ruling on the law of search and seizure which flagrantly violates the mandate of the Fourth Amendment. The opinion below holds that if property or effects are physically *capable* of being moved, then without any further showing, "exigent circumstances" exist to authorize a warrantless search and seizure by government agents.



The opinion overrules or ignores not only the uncontested facts in the case, but also ignores long established Constitutional principles of search and seizure law.

The decision below holding that the warrantless search of Petitioner's purses, while already in the actual or constructive possession of the federal agent and while Petitioner was the focus of a criminal investigation, conflicts with the decisions of this Court, other Courts of Appeals, and the Fifth Circuit itself.

#### A. Repeatedly this Court has held that searches and seizures conducted without a lawful warrant are *per se* unreasonable under the Fourth Amendment, subject only to a few limited exceptions. *Katz v. United States*, 389 U.S. 355, 357 (1967).

(1) Among the exceptions is that line of cases which authorize the search of automobiles, while they are moving upon the public highways *and* there is probable cause to search. *Carroll v. United States*, 267 U.S. 132 (1925); see also *Chambers v. Maroney*, 399 U.S. 48 (1970). Even then, there must be evidence of a reasonable likelihood that the automobile would or could be moved, with the loss or destruction of evidence; only on that proof is a warrantless search of that vehicle Constitutionally permitted. *Coolidge v. New Hampshire*, 403 U.S. 443, 462 (1971).

Another narrow exception to the warrantless search prohibition is founded on the factual existence of "exigent circumstances" which would preclude the time or opportunity for the investigative officers to present their case of probable cause to a magistrate. *Warden v. Haden*, 387

U.S. 294 (1967). Other limited exceptions to the prohibition against warrantless searches are not pertinent to this case.

The essence of the "automobile" and "exigent circumstances" exceptions is that the officer may have only a passing or fleeting opportunity to search before the suspected evidence disappears or is destroyed. Assuming that this exception can be applied to personal property such as Petitioner's purses, the Constitutional inquiry has only just begun.

(2) When an exception to the warrantless search prohibition is invoked, the burden of proving the exception by evidence is on the party asserting it. *Chimel v. California,* 395 U.S. 752, 761 (1969); *Stoner v. California,* 376 U.S. 483, 486 (1964); *Rios v. United States,* 364 U.S. 253, 261 (1960); *United States v. Jeffers,* 342 U.S. 48, 95 (1951); and *McDonald v. United States,* 335 U.S. 451, 454-455 (1948).

The exigent circumstances exception which is the basis of both the panel opinion and the *en banc* decision below, was never raised by the Government and was not briefed or submitted in the original argument; this idea appeared for the first time in the panel decision. The Government neither raised nor established this so-called exception in the trial court, or in the first appeal in the circuit court.

However raised, the "exigent circumstances" exception *must* be founded on a *factual basis* in the record which establishes that the search and seizure of Petitioner's purses and the contents was imperative under the circumstances *then and there.* This Court's uniform decisions, to which the *en banc* decision below pays mere "lip service", re-



quire *evidence* of the claimed "fleeting opportunity" to search. But what evidence in this record demonstrates any such fleeting chance to search Petitioner's property and effects? There is none—the search and seizure in this case fall far short of meeting Constitutional requirements.

The majority of the court below found that Petitioner's vague statement of her future intent or desire to send someone to pick up her property presented such a fleeting chance to search that "exigent circumstances" existed. But, as the dissent below points out, this conclusion is totally unsupported by any evidence in the record. There was no way for Petitioner to retrieve the purses unless the federal agent permitted the release of them to her; he had ample time to maintain the *status quo,* and to apply for a search warrant if he felt he had probable cause to search. The record is void of any hint that the purses were about to flee or escape before the federal agent had time to seek a search warrant. With these facts in mind, it becomes quite significant that the Government, in both the trial court and the circuit court, did not even try to sustain the search and seizure on the exigent circumstances exception—it is apparent that even the Government did not believe that exigent circumstances were present until the panel opinion was handed down. There is no evidence in the record which can be argued in support of any "exigent circumstances" theory.

(3) There being no exception to the requirement that the Government's investigator have a warrant to search and seize Petitioner's property and effects, the seizure was illegal and the evidence at trial should have been excluded. Even if there were probable cause to search, a warrant is nonetheless required. *Agnello v. United States,*

269 U.S. 20, 33 (1925). Even if there were probable cause to support a warrant, that judgment is for the magistrate and not the federal agent. *Johnson v. United States,* 333 U.S. 10, 13-14 (1947). The mandate of the Fourth Amendment and decisions of this Court were not followed in the Court below.

**B. The opinion below is in conflict with its own decisions and the decisions of other Courts of Appeals.**

(1) The decisions of other Circuits have long held that those who seek exemption from the requirement of a warrant must show *actual* "exigent circumstances" indicating imminent removal or destruction of evidence, not, as the court below ruled, a mere theoretical opportunity for such removal or destruction. *Cash v. Williams,* 455 F.2d 1227, 1231-1232 (6th Cir. 1972); *United States v. Payne,* 429 F.2d 169, 171-172 (9th Cir. 1970); *Eng Fung Jem v. United States,* 281 F.2d 803, 805 (9th Cir. 1960); and *Steeber v. United States,* 198 F.2d 615, 617-618 (10th Cir. 1952).

(2) Equally significant, the opinion below in spite of the majority disclaimer, is in irreconcilable conflict with its own recent decisions. *United States v. Anderson,* 500 F.2d 1311 (5th Cir. 1974); *United States v. Lonabaugh,* 494 F.2d 1257 (5th Cir. 1973); and *United States v. Garay,* 477 F.2d 1306 (5th Cir. 1973).

For these important reasons, a Writ of Certiorari should issue.



## II.

## THE DECISION BELOW HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AND HAS SO FAR SANCTIONED SUCH A DEPARTURE BY A DISTRICT COURT, AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

**A. Mrs. Hand was convicted and sentenced to prison for violations of a statute which had not been enacted on the dates alleged.**

Prior to October 19, 1970, there was no provision in law for federal insurance on credit union accounts. The enabling statute became effective on October 19, 1970. Six of the ten counts allege embezzlements from an *insured* credit union prior to October 19, 1970, and therefore are defective on their face. Three of the remaining four counts alleged embezzlements just a few days after the enabling legislation became effective, and it is not contested that on those three counts, the credit union could not possibly have had federal insurance. The last count alleged an embezzlement approximately three months after the statute was enacted, but there was absolutely no evidence that the credit union was insured on that date, or on any other date.

To circumvent this readily apparent defect in the proceedings, the majority of the Court of Appeals "amended" the indictment by disregarding the allegations of federal insurance as the jurisdictional basis and substituted federal incorporation as the jurisdictional basis, although there is not one word in any count of the indictment about federal incorporation, and the case was tried solely on

the theory that it was a federally insured institution. The fact that federal jurisdiction might possibly have been based on a federal charter did not come up until the case was on appeal.

It is a startling departure from the accepted and usual course of judicial proceedings to imprison a person for violating a statute which was not enacted at the time of the alleged offense. However, this is what the Court of Appeals has done, and has sanctioned by District Court. This Court therefore should exercise its power of supervision to correct this shocking violation of constitutional principles.

**B. There is a total lack of evidence in the record on one element of the offense, which lack of evidence is plain error under Rule 52(b), F. R. Crim. P., calling for reversal.**

The grand jury returned the indictment (Appendix, Page 33A) against Mrs. Hand alleging in ten counts embezzlement from a federally *insured* credit union. There was no allegation in any count of the indictment that it was a federally *chartered* credit union. Thus it is clear that the only basis for the court's jurisdiction is federal insurance of the accounts. However, it is uncontested that there was absolutely no evidence that the credit union had any insurance on its accounts on any date alleged in the indictment. Instead, the prosecution introduced the federal charter of the credit union without objection.

U. S. District Courts are not courts of general jurisdiction; the federal courts have limited jurisdiction and it is required that the jurisdiction of the court be *alleged* in the indictment and *proved* beyond a reasonable doubt.



The element of jurisdiction for any federal crime is no less important than any other element of the crime, and indeed may be more important as it goes to the heart of the court's power to act, and in this case, to imprison.

This Court has consistently reversed cases where there was no evidence on one essential element of the crime, under the plain error doctrine. See *Davis v. United States,* 160 U.S. 469 (1895); *Clyatt v. United States,* 197 U.S. 207 (1905); *Christoffel v. United States,* 338 U.S. 84 (1949). The courts of appeals, including the Fifth Circuit, consistently have so held, and this case is the first to depart from that requirement. The rule is well stated in *Clyatt, supra:*

> " * * * there is not a scintilla of evidence to show that [the victims] were ever theretofore in a condition of peonage. * * * We have examined the testimony with great care to see if there was anything which would justify a finding of the fact, and can find nothing. No matter how severe may be the condemnation which is due to the conduct of a party charged with a criminal offense, it is the imperative duty of a court to see that all the elements of his crime are proved, or at least that testimony is offered which justifies a jury in finding those elements. Only in the exact administration of the law will justice in the long run be done, and the confidence of the public in such administration be maintained." 197 U.S. at 222.

The Court of Appeals has departed from that long-standing rule of this Court and from its own decisions and the decisions of other circuits, and has sanctioned an *ad hoc* rewriting and amendment of a criminal indictment while the case was on appeal, for

the sole purpose of saving an insupportable conviction. Such action by the Court of Appeals has so far departed from the accepted and usual course of criminal proceedings as to call for an exercise of this Court's power of supervision to correct a manifest injustice not only for Mrs. Hand, but for guidance in future cases.

**C. There was no jury submission of the jurisdictional element of the offense.**

The District Court did not submit to the jury any element whatsoever for a jury finding on the jurisdictional element of the offense, whether the correct element be federal insurance or a federal charter. This is plain error under Rule 52(b), F.R.Crim.P., which must be noticed on appeal even without an objection in the trial court. There was no objection by the defense or the prosecution, but there is nothing in the record to bind the defense to a waiver; there was no invited error; there was no stipulation, agreement or other affirmative action by the defense which would excuse the submission of this essential element of the crime. This Court and the several courts of appeals have long held that failure to submit all of the elements of a crime constitutes plain error under Rule 52(b), F.R.Crim.P., and calls for reversal. However, this readily apparent reversible error was not even commented upon by the court of appeals in its decisions in this case. This radical departure from decisions of this Court and from the accepted and usual course of criminal proceedings in the federal court calls for this Court to exercise its power of supervision. The rule is well stated in *Screws v. United States,* 325 U.S. 91 (1945):

> "Where error so fundamental as not to submit to the jury the essential ingredient of the only offense on which the conviction could rest, we think it is necessary to take note of it on our own motion. Even those guilty of the most heinous offenses are entitled to a fair trial." 325 U.S. at 107.



Until now this rule has been consistently followed by the courts of appeals, most recently being stated by the Second Circuit in *United States* v. *Howard,* 506 F.2d 1131 (2d Cir. 1974):

> "It is clear that the judge's charge did not cover all of these elements of the crime. The Government contends, however, that the error was harmless because the only truly contested issue for the jury was the identity of the bank robbers. While that may be substantially true, we do not think it harmless error for a jury to find a man guilty of a federal offense without even knowing what the elements of the offense are.
>
> * * *
>
> When Howard exercised his constitutional right to a jury, he put the Government to the burden of proving the elements of the crimes charged to a jury's satisfaction, not to ours or to the district judge's. Thus, even if we believe that there was overwhelming proof of the elements not charged, we must still reverse."

Here the pleading, proof and jury submission of the federal court's jurisdiction was non-existent. This is plain error under Rule 52(b) F.R.Crim.P.

## CONCLUSION

Petitioner's conviction was upheld by a narrow eight-to-seven vote in a bitterly divided Fifth Circuit. The minority found it

> "* * * passing strange that exigent circumstances * * * was not urged in the district court, is never mentioned in the record, was not argued or relied on by the Government in its original briefs, and makes its appearance for the first time in the panel opinion."

Petitioner is reluctant to argue that the majority of the judges have become advocates in behalf of the Government in this case, but does agree with Judge Dyer's dissent that under the circumstances, the majority strivings do appear "passing strange". Judge Simpson stated in his dissent the only rationale for the majority:

> "* * * the majority labors mightily to salvage a patently unconstitutional search and seizure. This *ad hoc* approach serves the purpose, in addition to preserving Mrs. Hand's conviction, of approving unbelievably sloppy police work. * * * Poor performance by investigators and prosecutors should not pass muster unscathed and uncensored on the basis of an *ad hominem* approach that guilt of some offense is clear from the record. This misconceives our prime function of reviewing errors of law. I suggest also that occasional merited criticism of police and prosecutors is beneficial to the advancement of good order and discipline."

The Chief Justice and others have spoken publicly against the all-too-frequent low level of competency demonstrated by attorneys in the federal courts. The record of proceedings in this case might well be a classic example of the danger to our Constitutional government which results when there is such a low level of competency on the part of prosecutors and defense counsel; in such cases it may be tempting for some judges to "labor



mightily" to salvage an unconstitutional conviction, perhaps on the misplaced belief that it is in the public interest to do so. However, that function is not in the public interest because when such temptation is indulged by judges, the Constitution is warped and eroded, bringing us face-to-face with the specter of government by the capricious rule of men instead of our guaranteed Constitutional rule of law.

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the U. S. Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that The Solicitor General, Department of Justice, Washington, D. C. 20530, was served with three copies of the foregoing Petition for a Writ of Certiorari by mailing the same to him in a properly addressed, airmail postage prepaid envelope, this 24th day of October, 1975, and that three copies of said Petition for a Writ of Certiorari were served on the United States Attorney, U. S. Courthouse, Houston, Texas 77002, by mailing the same to him in a properly addressed, postage prepaid envelope on this 24th day of October, 1975.

MORTON L. SUSMAN

# APPENDIX

# APPENDIX

## PANEL OPINION

(Caption Omitted)

GEE, Circuit Judge:

Kathryn Frances Hand appeals from her conviction on a jury verdict of ten counts of embezzlement from her employer, a federally insured credit union. Her appeal presents, with others, contentions of unreasonable search and seizure, of deficiencies in the indictment and variances in proof, and of a constitutionally inadequate defense provided by her retained trial counsel.

Mrs. Hand was the bookkeeper and office manager of ILA 1351 Federal Credit Union (the Union), operating in Houston, Texas. According to her testimony, she discovered a serious shortage of cash in the Union accounts about 2½ years before the events which led to her indictment, a shortage which steadily increased over the ensuing time to many thousands of dollars. She was in effective control of the Union's accounting operations. Mrs. Hand admitted having concealed the increasing shortage from the federal credit union examiners over the course of several annual audits, but asserted that she had no idea where the funds were going. The technique which she employed in this scheme was that known in accountancy as "lapping," which involves using later cash receipts to match earlier deposits and relying on posting delay to bridge the gap between what should have been in the coffers and what was. Though her case presents troubling questions on two points, we affirm.

## I.

### *The Search and Seizure Contention*

Appellant Hand had placed within purses many cash-received vouchers which evidenced her scheme for concealing the credit union's shortage. These purses were located in or on file cabinets and desks in the Union's office. At a time when the focus of suspicion had begun to center strongly on Mrs. Hand, she told the federal examiner that she was sending someone by to pick up these purses, and perhaps other personal property. On receiving this word, he opened the purses—to ascertain whether or not they were hers, so he testified[1]—and discovered the incriminating vouchers.

Assuming that Hale was the sort of person to whose searches and seizures the Fourth Amendment applies, his search of the handbags in these circumstances raises close questions. Before us, the United States seeks to justify it under the "plain view" exception to warrant requirements, contending that Hale blundered upon the evidence in the course of an innocent attempt to find identification. This was, indeed, his testimony, and the trial court considered and rejected a motion to suppress after hearing it. It thus might seem the court credited Hale's explanation, an in limine fact-finding which we would be reluctant to overturn on a cold record.[2] On the other hand, the basis of

1. An assertion somewhat dubious at first blush, since they were women's handbags, and the only other female who worked in the office appears to have been present when he opened them.

2. See McCormick, Evidence § 53 at 121 (2d Ed. 197?):
"Accordingly, under the traditional view and the generally accepted principle the trial judge decides with finality those preliminary questions of fact upon which depends the admissibility of an item of evidence that is objected to under an exclusionary rule. . . ."



the court's ruling is not clear: the record indicates that the government urged that Hale was merely a private citizen, to whose searches Fourth Amendment safeguards did not apply, while the defense memorandum on the subject sought to negative consent as a warrant exception. The court merely overruled the defense motion to suppress, without elaboration. In these circumstances, where we are unable to determine with assurance whether the court made the fact-finding—innocent stumbling upon the evidence—upon which the plain view exception must rest, we must proceed further.[3] To do so requires consideration of the facts leading up to the search.

When Hale, the federal examiner, arrived in early April, 1971, to make his annual examination of the Union, he was aware from three previous examinations that the Union had had a continuing problem with the handling of cash. He considered Mrs. Hand to be the one who "ran" the Union. Almost immediately, he discovered a thirty-dollar cash shortage related to a particular cash voucher. In the course of the audit, other ominous signs appeared. Interest income appeared too small for the volume of loans. About $22,000 in unreported delinquent loans surfaced. Upon inquiry of Mrs. Hand, she produced—after a day's delay—extension agreements covering the delinquent loans, but four of these bore signatures which Hale felt, and advised Mrs. Hand, appeared suspicious. A check with one of the supposed signatories produced a receipt showing his loan had not been extended at all, but paid. At this point, Hale advised the Union's board of the situation, suggesting suspension of Mrs. Hand and

3. Though it seems likely, that, had the court felt Hale was testifying disingenuously, other consequences would have ensued.

a thorough investigation and verification of all accounts. On April 8, she was suspended.

The next day, April 9, Hale was informed by the other female employee of the Union, Mrs. Westergreen, that Mrs. Hand had telephoned about some missing ledger cards. Hale called Mrs. Hand, and she told him the names of various members whose ledger cards had, she said, mysteriously appeared that morning on her front porch. Hale and the credit union president went to her home that same day and received from her ledger cards corresponding to the names she had given over the telephone, most of which were torn across and which Hale recalled taping back together. Upon Hale's return to the Union office, he received yet another call from Mrs. Hand, one in which she confessed that a shortage of funds had been going on at the Union for two-and-a-half years, that during this period she had been concealing the shortage, and that though she did not know where the funds had gone she was willing to make some amount of restitution.

Against this background, Mrs. Hand also told Hale, either in the exchange in which she confessed cooking the books or in her third telephone call to him that day, that she was sending for some of her purses which were in the Union office, as well as some books and scarves. In the process of gathering up her property, Hale testified, he opened the purses, looking for credit cards or for other identification of them as Mrs. Hand's. He found identifying matter. He also found over 150 vouchers minuting cash transactions in tens of thousands of dollars, the very great majority of which were initialed by Mrs. Hand as the receiving person. Assuming the worst, that a deliberate, warrantless search of the purses was carried out at this point by Hale, does it pass Fourth Amendment muster?



[1] We conclude that it does. By the time Hale learned of Mrs. Hand's immediate purpose to remove her handbags from the office, she had admitted juggling the Union's accounts; and numerous of its financial records had appeared at her home, under highly suspicious circumstances and in a condition indicating an aborted effort to destroy them. Probable cause existed to believe that she had previously concealed and removed and might again conceal or remove records, and the purses were a likely vehicle for either action. Hale would have been remiss in his duty had he permitted such containers to be abstracted from the proximity of the accounting files without determining that they were not being so used.

It may be that in these circumstances, even absent Mrs. Hand's notice that she was sending for the purses, Hale would have been authorized by the Union's consent to examine the contents of such containers as he found in and about the files. The record indicates that purses were either in or on the file cabinets or desks in the office, and it does not indicate that Mrs. Hand had use of these furnishings to the exclusion of other employees, rather the contrary.[4] And though personal handbags imply privacy, the fact that numbers of them were left about the

4. This circumstance, with the highly specific nature of the probable cause here present to believe Mrs. Hand might have concealed her employer's property for her own purposes, tends to distinguish the case at bar from United States v. Blok, 88 U.S. App. D.C. 326, 188 F.2d 1019 (1951), in which an employer's consent was held ineffective to validate search for evidence of an extraneous crime of a desk reserved for an employee's exclusive use. There the Court noted: "Her superiors could not reasonably search the desk for her purse . . . or anything else that did not belong to the government [her employer] and had no connection with the work of the office." 188 F.2d at 1021. Here, though Mrs. Hand's purse was searched, it was precisely such matter which, with probable cause, was sought.

office while she was elsewhere places these in a position little more personal, if at all, than that which would have been held by a closed folder found in the files and marked, say, "F. K. Hand—Personal." At any rate, he received Mrs. Hand's call stating her purpose to remove the purses while present in a place where he was authorized to be and to most of which he had an unquestioned right of access.

But when to these is added the exigency of Mrs. Hand's stated purpose to send for the purses, the scale is decisively tipped. On the record, Hale's choices at this juncture were to release the purses unexamined, to refuse to release them while he contacted regular law enforcement authorities and a warrant issued, or to inspect their contents and be guided by what he found. Probable cause existing, the first course would have been a dereliction of duty. As to the latter two, if Hale's official "investigative" position was such as to subject him to Fourth Amendment strictures, it was perforce such as to authorize his seizure and immobilizing of the purses. Having the power to seize, in the situation presented, he had the duty to do so. And having seized, the lesser intrusion was to check the purses for Union documents and, if none were found, to release them without more ado. Chambers v. Maroney, 399 U.S. 42, 51-52, 90 S.Ct. 1975, 1981-1982, 26 L.Ed. 2d 419, 428 (1970); United States v. Soriano, ____F.2d ____ (5th Cir., en banc, 1974) [No. 72-1520, July 15, 1974, slip op. 5783].

It is true that the facts of *Chambers* and *Soriano* differ from these and from each other, and true moreover that Mrs. Hand was not under arrest[5] and her handbags did

5. Though probable cause to arrest her doubtless existed at the time of the search.



not contain, and were not thought to contain, contraband or dangerous instrumentalities. But they were easily movable, and she had announced a positive and immediate intent to remove them. There was probable cause to believe that they contained evidence, and the opportunity to preserve it was fleeting. In the totality of these circumstances, we conclude that the reasoning of *Chambers* transcends its factual setting sufficiently to justify the search. And we have held in Carlton v. Estelle[6] that warrantless search of a parked car for "mere evidence" was justified by the presence of persons presumably sympathetic to Carlton who might have made away with it. Here the suspect herself had avowed an immediate intent to have the movable and suspect articles removed. In these circumstances, the seizure and search were permissible.

II.

*The Indictment: Was Jurisdiction Alleged and Proved?*

Appellant also raises in various modes and points what may be seen either as a deficiency in the indictment, a variance between the accusation and the proof, or a failure of proof. The indictment contained ten counts. Each, except for dates and amounts, was identical to the others. Count I will therefore serve to illustrate all of them:

COUNT I

That on or about the 25th day of July, 1968, in the Houston Division of the Southern District of Texas, and within the jurisdiction of this Court, one KATHRYN FRANCES HAND, being an employee of the ILA 1351,

6. 480 F.2d 759 (5th Cir. 1973).

Federal Credit Union, Houston, Texas, the deposits of which Credit Union were then and there insured by the National Credit Union Administration, did knowingly and with intent to injure and defraud the said ILA 1351, Federal Credit Union at Houston, Texas, embezzle certain monies of the said Credit Union, which had therefore been entrusted to the care and custody of the said KATHRYN FRANCES HAND by reason of her position as an employee of said Credit Union in the amount of One Thousand One Hundred Ninety Four and 94/100 ($1,194.94) Dollars, more or less.

(Violation: Title 18, United States Code, Section 657)

It is undisputed that the United States offered no proof that the deposits of the Union were insured in the manner charged in the indictment or, indeed, in any manner.[7] Moreover, 18 U.S.C. § 657 did not include embezzling from an insured institution as an offense before it was amended to do so, effective October 19, 1970. The first six counts of the indictment charge offenses committed before that date, and thus—insofar as they merely charge embezzlement from an insured institution—charge what was not made a crime by 18 U.S.C. § 657 or by any other law at the time of the asserted offense. The question of the existence vel non of insurance was not submitted to the jury as an element of the offense charged,[8] and appellant contends that consequently the jury failed to find a crucial and jurisdictional element of the alleged crimes. As to the accusation of having embezzled from a federally insured institution, appellant is entirely correct: it was neither proved nor found.

7. For all the record shows they well may not have been.

8. Though the statute, elided to refer only to insured institutions, was read as an earlier part of the court's charge.



It remains to consider whether this admitted variance between pleading and proof was fatal. We also consider whether the indictment sufficiently charges as well the commission of the crime of embezzling from a federally *chartered* credit union and, if so, whether the conviction may properly be affirmed on this ground.[9]

The indictment is clearly susceptible of being read as charging that Mrs. Hand's offense was committed against an entity which (1) was a federal credit union and (2) the deposits of which were federally insured. It is also susceptible of being read as referring to an entity which merely incorporated the phrase "Federal Credit Union" in its title. Competent pleading of this jurisdictional ground would at the least have added some such phrase as, "a federal credit union" after what was arguably merely a title. Had this been done, the allegation of this ground of jurisdiction would have been clearly sufficient. United States v. McAdams.[10] This careless omission, together with the utter failure of proof as to the other ground of jurisdiction alleged, remits us to a brief consideration of first principles which should have had no place whatever in this case. These may be simply stated, the difficulty is in their application.

[2-4] Common-law ruffles and flourishes form no part of the current law of criminal pleading. An indictment is sufficient which plainly asserts the essential facts of the offense.[11] The purpose of the indictment is said to be to

9. At all pertinent times § 657 denounced this as a crime. United States v. McCarthy, 196 F.2d 616 (7th Cir. 1952); United States v. McAdams, 303 F.Supp. 824 (N.D. W.Va. 1969).

10. *Id.*

11. Fed. R. Crim. P. 7(c).

inform the accused of the charge against him sufficiently for him to prepare his defense, to protect him after conviction or acquittal against further prosecution for the same cause, and to inform the court of the facts charged so that, if necessary, it may pass on their legal sufficiency to support a conviction.[12] Surplusage, though subject to being stricken on defendant's motion, does not vitiate an indictment.[13]

[5] As noted above, each count of Mrs. Hand's indictment alleges that, while employed by " . . . ILA 1351, Federal Credit Union, Houston, Texas, the deposits of which Credit Union were then and there insured by the National Credit Union Administration. . . ." she made away with funds entrusted to her. The United States entirely failed to prove the alleged insurance, but proved the Union was a federal one, chartered under the laws of the United States, beyond peradventure. If the indictment's reference to insurance be regarded as surplusage, and if its reference to ILA 1351, Federal Credit Union, is a sufficient allegation of federal incorporation, then the government has alleged two jurisdictional bases, either of which would do, and proved one of them. "Federal Credit Union" is a term of art[14] analogous to "National Bank" and similar titles. And so, stated most favorably to Mrs. Hand, the decision under this head of appeal comes down to this: as a matter of criminal pleading, was jurisdiction sufficiently alleged, against objection made for the first

12. 1 Wright, Federal Practice and Procedure: Criminal § 125.

13. Fed. R. Crim. P. 7(d); see 1 Wright, Federal Practice and Procedure: Criminal § 127.

14. Defined at 12 U.S.C. § 1752 as a cooperative association organized under that chapter, which is, in turn, entitled the "Federal Credit Union Act." 12 U.S.C. § 1751.



time on appeal, by the simple assertion that defendant embezzled from "the X National Bank" or "the Y Federal Credit Union." Not without difficulty, we conclude that it was.

There can be little doubt that the major purposes of an indictment were served by this one. Mrs. Hand was charged with embezzling specified sums from her named employer, for whom the record shows she had worked about five years before being suspended. Here is no question such as might have been presented had she worked for two or three with similar names, or picked several pockets in one day; she well knew what she was accused of. This was fair notice to her under the Sixth Amendment. And it is equally plain that, in the event of conviction or acquittal, the pleading—supplemented if necessary by the record of all proceedings against her[15]—would suffice to protect her from further jeopardy. It is with Fed.R.Crim.P. 7(c)[16] and its demand for " . . . a plain, concise and definite written statement of the essential facts constituting the offense charged. . . . that we come to the rub.

[6, 7] A skimpier assertion of jurisdiction can scarcely be imagined than we find here. The element is, moreover, one which can in no sense be waived or cured by verdict, being of the type whose absence is available for considera-

15. Russell v. United States, 369 U.S. 749, 82 S.Ct. 1038, 8 L.Ed. 2d 240 (1962); Woodring v. United States, 376 F.2d 619 (10th Cir. 1967).

16. And with the third function of the indictment, to "set out the specific offense," Russell v. United States, 369 U.S. at 768, 82 S.Ct. at 1049, 8 L.Ed.2d at 253, so as "to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction. . . ." United States v. Cruikshank, 92 U.S. 542, 558, 23 L.Ed. 588, 593 (1875).

tion even on motion in arrest of judgment.[17] Yet the modern rule for treatment of indictments is that they are to be read as a whole and interpreted in a common-sense manner, free of the trammels devised by the common law at a time when every felony was punishable by death,[18] and the rule is not otherwise as to essential elements of the pleading. Such a reading indicates that an entity styled a "Federal Credit Union" is at least very likely to be a federal credit union, whether or not realleged to be such in lower case. Nor need there be fear in this case, such as was expressed in Stirone v. United States, 361 U.S. 212, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960), that the grand jury which returned this indictment did not mean to charge the offense of which Mrs. Hand was convicted. No prejudice to the substantial rights of Mrs. Hand appears from the sketchiness of the pleading, and hence it was not fatally defective. Berger v. United States, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed 1314 (1935). Indeed, it is far from certain that an entire failure to allege the federal character of the association would have been fatal, where a proper head of jurisdiction was alleged and another was proved without objection to the evidence as variant, and without motion for judgment of acquittal, motion in arrest of judgment, or other outcry below. Cf. Jackson v. United States, 123 U.S. App. D.C. 276, 359 F.2d 260 (1966).[19] In these circumstances the indictment, though a good example of bad practice, did not mislead or prejudice Mrs. Hand and was sufficient.

17. Fed. R. Crim. P. 34.

18. 6 Moore, Federal Practice ¶7.04.

19. If more be needed, defendant's requested jury instructions inquired merely whether Mrs. Hand was the employee of ILA 1351, Federal Credit Union.



## III.

*Inadequacy of Trial Counsel and Other Matters* . .

[8] Appellate counsel for Mrs. Hand faults retained trial counsel by hindsight for failing to take various steps in the course of the proceedings below. A catalogue of things which might have been done and were not is presented. Though we are not in the business of rating legal performance,[20] we have considered counsel's supposed deficiencies, severally and in total effect, in relation to the record and are entirely unable to say that the charge is well grounded. Nothing is advanced which may not be viewed either as a legitimate tactical choice, the relinquishment of an untenable position or, at worst, an honest mistake. We take occasion to reiterate both that we do not view such roundings on trial counsel with favor and that there is a wide expanse of tolerance for ability of counsel between success in the case and an inadequacy so extreme and so clear as to offend the Constitution.

We have carefully considered appellant's remaining points, as well as those which we have discussed. None requires reversal.

Affirmed.

20. Horsley v. Simpson, 400 F.2d 708 (5th Cir. 1968).

## EN BANC OPINION

(Caption Omitted)

Before BROWN, Chief Judge, and WISDOM, GEWIN, BELL, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, SIMPSON, MORGAN, CLARK, RONEY and GEE, Circuit Judges.

GEE, Circuit Judge: *

Kathryn Frances Hand was convicted by a jury of ten counts of embezzlement from her employer, a federally insured credit union. Her appeal presents, with others, contentions of unreasonable search and seizure, of deficiencies in the indictment and variances in proof, and of an inadequate defense by retained trial counsel.

Mrs. Hand was the bookkeeper and office manager of ILA 1351 Federal Credit Union (the Union), operating in Houston, Texas. About 2½ years before the events which led to her indictment, she testified, she discovered a serious shortage of cash in the Union accounts, a shortage which steadily increased over the ensuing time to many thousands of dollars. In effective control of the Union's accounting operations, she admitted having concealed the growing shortage from federal examiners over the course of several annual audits, but maintained that she had no idea where the funds were going. The technique she used to hide the shortage is known in accountancy as "lapping": using later cash receipts to match earlier deposits and relying on posting delay to bridge the gap between what should have been in the coffers and what was. We affirm her conviction.

* The subject and author being the same as in the panel opinion, 497 F.2d 929 (5th Cir. 1974), considerable portions of that opinion appear here, without quotation marks or further attribution.



## I.

### *The Search and Seizure Contention*

Appellant Hand had concealed in several purses many cash-received vouchers evidencing her scheme for concealing the credit union's shortage. These purses were located in or on file cabinets and desks in the Union's office. At the exact moment, or very shortly after, she had given Hale, the federal examiner, probable cause to think her the thief, she advised him that she was sending by for these purses. On receiving this word, he opened the purses—to ascertain whether or not they were hers, he testified[1]—and discovered the incriminating vouchers.

Assuming that Hale was the sort of person to whose searches and seizures the Fourth Amendment applies, his search of the handbags in these circumstances, however natural and reasonable, raises close questions. Before us, the United States seeks to justify it under the "plain view" exception to warrant requirements, contending that Hale blundered upon the evidence in the course of an innocent attempt to find identification. This was, indeed, his testimony, and the trial court considered and rejected a motion to suppress after hearing it. It thus might seem the court credited Hale's explanation, an in limine fact-finding which we would be reluctant to overturn on a cold record.[2] On the other hand, the basis of the court's

1. An assertion somewhat dubious at first blush, since they were women's handbags, and the only other female who worked in the office appears to have been present when he opened them.

2. See McCormick, Evidence § 53 at 121 (2d Ed. 1972): "Accordingly, under the traditional view and the generally accepted principle the trial judge decides with finality those preliminary questions of fact upon which depends the admissibility of an item of evidence that is objected to under an exclusionary rule. . . ."

ruling is not clear: the record indicates the government urged that Hale was merely a private citizen, to whose searches Fourth Amendment safeguards did not apply, while the defense memorandum on the subject sought to negative consent as a warrant exception. The court merely overruled the defense motion to suppress, without elaboration. In these circumstances, where we are unable to determine with assurance whether the court made the fact-finding — innocent stumbling upon the evidence — upon which the plain view exception must rest, we must proceed further.[3] To do so requires consideration of the facts leading up to the search.

When Hale arrived in early April, 1971, to make his annual examination of the Union, he was aware from three previous examinations of its continuing problem with the handling of cash. He considered Mrs. Hand to be the one who "ran" the Union. Early on, he discovered a thirty-dollar cash shortage related to a particular cash voucher. In the course of the audit, other ominous signs appeared. Interest income appeared too small for the volume of loans. About $22,000 in unreported delinquent loans surfaced. Upon inquiry of Mrs. Hand, she produced—after a day's delay—extension agreements covering the delinquent loans, but four of these bore signatures which Hale felt, and advised Mrs. Hand, appeared suspicious. A check with one of the supposed signatories produced a receipt showing his loan had not been extended at all, but paid. At this point, Hale advised the Union's board of the situation, suggesting suspension of Mrs. Hand and a thorough investigation and verification of all accounts. On April 8, she was suspended.

3. Though it seems likely that, had the court felt Hale was testifying disingenuously, other consequences would have ensued.



The next day, April 9, Hale was informed by the other female employee of the Union, Mrs. Westergreen, that Mrs. Hand had telephoned about some missing ledger cards. Hale called Mrs. Hand, and she told him the names of various members whose ledger cards had, she said, mysteriously appeared that morning on her front porch. Hale and the credit union president went to her home that same day and received from her ledger cards corresponding to the names she had given over the telephone, most of which were torn across and which Hale recalled taping back together. Upon Hale's return to the Union office, Mrs. Hand called again and confessed that a shortage of funds had been going on at the Union for two-and-a-half years, that during this period she had been concealing the shortage, and that though she did not know where the funds had gone she was willing to make some amount of restitution.[4]

At about the same time, Mrs. Hand also told Hale, either in this call or in a third call to him that day, that she was sending for some of her purses which were in the Union office, as well as some books and scarves. In the process of gathering up her property, Hale testified, he opened the purses, looking for credit cards or for other identification of them as Mrs. Hand's. This he found. He also found over 150 vouchers minuting cash transactions in tens of thousands of dollars, most of which were initialed by Mrs. Hand as the receiving teller. Assuming the worst, that a deliberate, warrantless search of the purses was carried out at this point by Hale, does it pass Fourth Amendment muster?

4. Which revelations certainly amount to probable cause.

[1] We conclude that it does. By the time Hale learned of Mrs. Hand's immediate purpose to remove her handbags from the office, she had admitted juggling the Union's accounts; and numerous of its financial records had appeared at her home, under highly suspicious circumstances and in a condition indicating an aborted effort to destroy them. Probable cause existed to believe that she had previously concealed and removed and might again conceal or remove records, and the purses were a likely vehicle for either action. Hale would have been remiss in his duty had he permitted such containers and their contents to be taken away from the accounting files without determining that they were not being so used.

It may be that in these circumstances, even absent Mrs. Hand's notice that she was sending for the purses, Hale would have been authorized by the Union's consent to examine the contents of whatever containers he found in and about the files. The record indicates that purses were either in or on the file cabinets or desks in the office, and it does not indicate that Mrs. Hand had use of these furnishings to the exclusion of other employees, rather the contrary.[5] And though personal handbags imply privacy, the fact that numbers of them were left about the office while she was elsewhere places these in a position little

5. This circumstance, with the highly specific nature of the probable cause here present to believe Mrs. Hand might have concealed her employer's property for her own purposes, tends to distinguish the case at bar from United States v. Blok, 88 U.S. App. D.C. 326, 188 F.2d 1019 (1951), in which an employer's consent was held ineffective to validate search for evidence of an extraneous crime of a desk reserved for an employee's exclusive use. There the Court noted: "Her superiors could not reasonably search the desk for her purse . . . or anything else that did not belong to the government [her employer] and had no connection with the work of the office." 188 F.2d at 1021. Here, though Mrs. Hand's purse was searched, it was precisely such matter which, with probable cause, was sought.



more personal, if at all, than that which would have been held by a closed folder found in the files and marked, say "K. F. Hand-Personal." At any rate, he received Mrs. Hand's call stating her purpose to remove the purses while present in a place where he was authorized to be and to most of which he had an unquestioned right of access.

But when to these is added the exigency of Mrs. Hand's stated purpose to send for the purses, the scale is decisively tipped. Hale's choices at this juncture were to release the purses unexamined, to refuse to release them while he contacted regular law enforcement authorities and a warrant issued, or to inspect their contents and be guided by what he found. Probable cause existing, the first course would have been a dereliction of duty. As to the latter two, if Hale's official "investigative" position was such as to subject him to Fourth Amendment strictures, it was perforce such as to authorize his seizure and immobilizing of the purses. Having the power to seize, in the situation presented, he had the duty to do so. And having seized, the lesser intrusion was to check the purses for Union documents and, if none were found, to release them without more ado. Chambers v. Maroney, 399 U.S. 42, 51-52, 90 S.Ct. 1975, 1981-1982, 26 L.Ed.2d 419, 428 (1970); United States v. Soriano, 497 F.2d 147 (5th Cir., en banc, 1974).

It is true that the facts of *Chambers* and *Soriano* differ from these and from each other, and true moreover that Mrs. Hand was not under arrest[6] and her handbags did not contain, and were not thought to contain, contraband or dangerous instrumentalities. But they were easily movable, and she had announced a positive and immediate

6. Though probable cause to arrest her doubtless existed at the time of the search.

intent to remove them. There was probable cause to believe that they contained evidence, and the opportunity to preserve it was fleeting. The probable cause, moreover, had arisen suddenly and as a result of unforeseeable circumstances—Mrs. Hand's abrupt confession to cooking the books. Thus the exact requirements for application of *Chambers* set out by Mr. Justice White were complied with:

> ". . . the circumstances that furnish probable cause to search a particular auto for particular articles are most often unforeseeable; moreover, the opportunity to search is fleeting since a car is readily movable. *Where this is true,* as in *Carroll* [Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543] and the case before us now, if an effective search is to be made at any time, either the search must be made immediately without a warrant or the car itself must be seized and held without a warrant for whatever period is necessary to obtain a warrant for the search.
>
> . . . . .
>
> Arguably, because of the preference for a magistrate's judgment, only the immobilization of the car should be permitted until a search warrant is obtained; arguably, only the 'lesser' intrusion is permissible until the magistrate authorizes the 'greater.' But which is the 'greater' and which the 'lesser' intrusion is itself a debatable question and the answer may depend on a variety of circumstances. For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment."



Chambers v. Maroney, 399 U.S., at 50-2, 90 S.Ct., at 1981, 26 L.Ed.2d, at 428 (emphasis added).

It is, of course, true that on its facts *Chambers* is an "automobile" case. But then Erie R.R. Co. v. Tompkins[7] is, in the same sense, a "railroad" case, Harry Tompkins having been there presented with lasting fame and a tort suit by a passing freight. At least two of our sister circuits read *Chambers* as broadly applicable whenever probable cause is sudden and the chance to search fleeting. United States v. Mehciz, 437 F.2d 145 (9th Cir.), cert. denied, 402 U.S. 974, 91 S.Ct. 1663, 29 L.Ed.2d 139 (1971); United States v. Evans, 481 F.2d 990 (9th Cir. 1973); United States v. Johnson, 467 F.2d 630 (2d Cir. 1972), cert. denied, 413 U.S. 920, 93 S.Ct. 3069, 37 L.Ed.2d 1042 (1973). And a majority of the Supreme Court has refused to join in later language characterizing *Chambers* as limited in force to automobiles, it being often overlooked that the passage in Collidge v. New Hampshire[8] which sought to do so was joined in by only four Justices.

In the totality of circumstances presented by this case, we therefore conclude that the reasoning of *Chambers* transcends its factual setting sufficiently to justify the search. And we have held in Carlton v. Estelle[9] that a warrantless search of a parked car for "mere evidence" was justified by the presence of persons presumably sympathetic to Carlton who might have made away with it. Here the suspect herself had avowed an immediate intent to have the movable and suspect articles removed, and it

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7. 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).

8. 403 U.S., at 463, 91 S.Ct., at 2036, 29 L.Ed.2d, at 581.

9. 480 F.2d 759 (5th Cir.), cert. denied, 414 U.S. 1043, 94 S.Ct. 546, 38 L.Ed.2d 334 (1973).

well appeared there might be another or other unknown persons with an interest in tampering with them. The seizure and search of the handbags were permissible.[10]

## II.

*The Indictment: Was Jurisdiction Alleged and Proved?*

[2] We adopt Part II of the panel opinion[11] headed as above, as the opinion of the Court on the sufficiency of the indictment. We emphasize that we hold no more

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10. It has been suggested that our recent decisions in one form of baggage-search case—United States v. Garay, 477 F.2d 1306 (5th Cir. 1973); United States v. Lonabaugh, 494 F.2d 1257 (5th Cir. 1973); United States v. Anderson, 500 F.2d 1311 (5th Cir. 1974)—are opposed to our conclusions in this case. But these cases are factually quite different from ours. In each of them our panel saw the defendant, with his known confederates, if any, as sufficiently immobilized by an arrest or restraint amounting to de facto arrest, and the baggage to be searched under sufficient control of the police, that no factors excusing failure to apply to the magistrate existed. In the case at bar Mrs. Hand and, if she were believed, the unknown thief were both at large with means of access to the office where the handbags were, so that by no means short of carrying the handbags to the magistrate's office with him could Hale have secured them while obtaining a search warrant. How much more reasonable to check one quickly for contraband!

These decisions can, indeed, be extended to conflict in principle with *Chambers'* holding that if one has the right to seize, he has the right to search; but it does not appear that this aspect of *Chambers* was argued to our panels in those cases or any attempt made to analyze the police actions taken in them along greater-intrusion, lesser-intrusion lines. What the result of such an analysis would have been, we cannot say, but we need not disturb these authorities to decide this case, the factor of secure control by the authorities of the item to be searched being present in each of them, but absent here. *Chambers* may therefore properly be applied here without necessarily extending it to the situations which they present. Time enough when another such as this is presented and we are asked to apply the *Chambers'* rule and analysis to it.

11. 497 F.2d, at 932-5.



than that this indictment withstands an objection made for the first time on appeal, where it is apparent that Mrs. Hand's substantial rights were not affected. *Cf.* United States v. Eaton, 501 F.2d 77 (5th Cir. 1974).

## III.

*Inadequacy of Trial Counsel and Other Matters.*

We likewise adopt Part III of the panel opinion, adding only that since our intervening en banc decision in Fitzgerald v. Estelle, 505 F.2d 1334 (5th Cir. 1974), it is yet more evident that Hand's assistance from her retained counsel was not inadequate.

Affirmed.

DYER, Circuit Judge, with whom WISDOM, THORNBERRY, GOLDBERG, SIMPSON and MORGAN, Circuit Judges, join, dissenting at to Part I:

On April 8, 1971, Mrs. Hand was suspended and relieved of her duties as bookkeeper and office manager of the Union and departed. On the following day she telephoned Hale, the federal examiner, from her home to talk about the shortage of funds and to tell him of her willingness to make restitution. During this conversation Mrs. Hand told Hale that she would send someone to the Union's office to pick up her personal belongings, some books, scarves, and two purses. In gathering up her property for delivery to Mrs. Hand's messenger, Hale made a deliberate, warrantless search of the purses and found incriminating evidence in them.

I find it passing strange that exigent circumstances, the foundation used by the majority to approve the search of

the purses, was not urged in the district court, is never mentioned in the record, was not argued or relied upon by the Government in its original briefs, and makes its appearance for the first time in the panel opinion. The majority, upon finding probable cause for the search, adds to it "the exigency of Mrs. Hand's stated purpose to send for the purses," and concludes that "the scale is decisively tipped."

A "stated purpose" to send for her purses is hardly an exigent, pressing, critical or urgent circumstance upon which to premise a parallelism with automobile search cases. Hale had the purses in his sole and exclusive possession and was under no constraint to deliver them to Mrs. Hand's messenger or anyone else before obtaining a search warrant. To apply the word "exigent" to this situation is to say "when *I* use a word, . . . it means just what I choose it to mean—neither more nor less."[1]

The majority now vindicates warrantless searches of "mobile objects" in any context if a preceding warrantless seizure is consitutionally permissible. The express source of this reasoning is *Chambers* itself, which indicated that with respect to an automobile, a permissible warrantless seizure justified an immediate warrantless search. What the majority ignores in expanding *Chambers* to inter *the*

1. "I don't know what you mean by 'glory,'" Alice said. Humpty Dumpty smiled contemptuously. "Of course you don't—till I tell you. I meant 'there's a nice knock-down argument for you;'" "But 'glory' doesn't mean 'a nice knock-down argument,'" Alice objected. "When *I* use a word," Humpty Dumpty said in rather a scornful tone, "it means just what I choose it to mean—neither more nor less." "The question is," said Alice, "whether you *can* make words mean different things." "The question is," said Humpty Dumpty, "which is to be master—that's all."

Lewis Carroll, Through the Looking Glass



non-auto search cases of United States v. Anderson, 5 Cir. 1974, 500 F.2d 1311; United States v. Lonabaugh, 5 Cir. 1973, 494 F.2d 1257; United States v. Garay, 5 Cir. 1973, 477 F.2d 1306, is that *Chambers* was expressly limited by Coolidge v. New Hampshire, 1971, 403 U.S. 443, 463, n. 20, 91 S.Ct. 2022, 29 L.Ed.2d 564, *solely* to the auto-search situation. Beyond this, *Chambers* cannot go.

More fundamentally, the majority's simplistic equation sweeps so broadly as to flout settled principles of Fourth Amendment law. The extent of a governmental intrusion into an individual's protected privacy has always been a critical component in determining reasonableness under the Fourth Amendment. For example, Terry v. Ohio, 1968, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889, unmistakably teaches that a determination of the lawfulness of a warrantless seizure is only half the inquiry. Any ensuing search, an additional incursion, "must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible." Id. at 19, 88 S.Ct. at 1878. Had Terry, when accosted on the street by the investigating officer, been transporting a suitcase, a full-scale search of the bag's contents would have presented a far different situation than a limited pat-down of his outer garments accomplished for the narrow purpose of detecting weapons. "The Fourth Amendment proceeds as much by *limitations upon the scope of* governmental action as by imposing preconditions upon its initiation." *Id.* at 28-29, 88 S.Ct. 1883. (Emphasis supplied).

Nor is Terry v. Ohio *sui generis*. The Supreme Court has consistently inquired into the extent or scope of a warrantless incursion, demanding that the imposition on

the citizen be no greater than the occasion requires. *See, e. g.*, United States v. Van Leeuwen, 1970, 397 U.S. 249, 90 S.Ct. 1029, 25 L.Ed.2d 282; Chimel v. California, 1969, 395 U.S. 752, 762-64, 89 S.Ct. 2034, 23 L.Ed.2d 685; Sibron v. New York, 1968, 392 U.S. 40, 65, 88 S.Ct. 1889, 20 L.Ed.2d 917. This Court has, until today, faithfully adhered to this analysis. *See, e. g.*, United States v. Gravitt, 5 Cir. 1973, 484 F.2d 375; United States v. Cyzewski, 5 Cir. 1973, 484 F.2d 509; United States v. Skipwith, 5 Cir. 1973, 482 F.2d 1272. In short, necessity remains the *sine qua non* of exceptions to the warrant requirement. Auto searches aside, when the exigencies necessitating a warrantless incursion dissipate, resort to the magistrate must be had. As the Supreme Court has stated, "[w]e are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police." McDonald v. United States, 1948, 335 U.S. 451, 455, 69 S.Ct. 191, 193, 93 L.Ed. 153.

Whatever may be the final delineation of exceptions to the warrant requirement, we must vigilantly bear in mind that absent imperative circumstances a warrantless search is *per se* unreasonable. Coolidge v. New Hamphire, *supra*, 403 U.S. at 454-55, 91 S.Ct. 2022; Katz v. United States, 1967, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576. I respectfully submit that *Anderson, Lonabaugh* and *Garay* are correct expressions of this heretofore unchallenged principle. These cases are now overruled by the majority's transparent attempt to distinguish the indistinguishable. I dissent.



GODBOLD, Circuit Judge, dissenting as to Part I:

I agree with Judge Dyer except in his conclusion that *Garay*,[1] *Lonabaugh*[2] and *Anderson*[3] have been overruled.

I confress my confusion at the majority's rationale which seems to say on the one hand that since there were exigent circumstances Hale was empowered to seize, and having justifiably seized he could search (the "greater-lesser instrusion" theory), while on the other hand it distinguishes *Garay, Lonabaugh* and *Anderson* on the ground that in those cases the police already had "secure control" of the item involved (i.e., the "greater intrusion" already had been consummated), therefore there was no right to search. Despite this nonexplanation we are bound to accept and to apply the majority's conclusion that *Garay, Lonabaugh* and *Anderson* retain a field of operation and are viable in situations where they are applicable.[4]

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1. United States v. Garay, 477 F.2d 1306 (C.A. 5, 1973).

2. United States v. Lonabaugh, 494 F.2d 1257 (C.A. 5, 1973).

3. United States v. Anderson, 500 F.2d 1311 (C.A. 5, 1974).

4. The majority's unqualified citation of United States v. Soriano, 497 F.2d 147 (C.A. 5, 1974) (en banc) arguably implies that the decision in that case supports the greater-lesser intrusion concept. If such an implication is intended, it is not supportable. That decision explicitly rested upon the concept of automobile search and the nexus to an automobile search provided by the facts that the suitcases had just been removed from the taxicab and placed on the sidewalk and one of them searched contemporaneously with the removal. 497 F.2d at 149-150 and footnote 6. This court eschewed a generalized ruling on the applicability of the greater-lesser intrusion language of Chambers v. Maroney, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970), to personal effects having no nexus to an automobile subject to search.

SIMPSON, Circuit Judge, with whom DYER, Circuit Judge, joins, dissenting as to Part II:

I concur in Judge Dyer's dissent, and fully associate myself with his views as to the constitutionally impermissible nature of the warrantless search and seizure involved in this appeal.

Additionally, I dissent from Part II of the majority opinion for the en banc court, which adopts Part II of the panel opinion, (5th Cir.) 497 F.2d at 932-935. I disagree with Part II as to each of the two postulates it advances: (a) that a federal offense under Title 18, Section 657, was charged by any or either of the ten counts under which Mrs. Hand was indicted,[1] and (b) that there was proof of the commission of a federal offense under any or either of the indictment counts.[2]

As to (a) I am content to rest my position upon the statement of the panel opinion, (5th Cir.) 497 F.2d at 934, that

> A skimpier assertion of jurisdiction can scarcely be imagined than we find here. The element is, moreover, one which can in no sense be waived or cured by verdict, being of the type whose absence is available for consideration even on motion in arrest of judgment,

1. The indictment contained ten counts, each identical to the other nine except for dates and amounts. A sample count, Count I, is copied in the text of the panel opinion, (5th Cir.) 497 F.2d 933.

2. See the language of Mr. Justice Black in Cole v. Arkansas, 1948, 333 U.S. 196, 201, 68 S.Ct. 514, 517, 92 L.Ed.2d 644, 647:
"It is as much a violation of due process to send an accused to prison following conviction of a charge upon which he was never tried as it would be to convict him upon a charge that was never made".
Both sides of the coin appear here.



as well as the additional statements, 497 F.2d at 933:

> The question of the existence vel non of insurance was not submitted to the jury as an element of the offense charged, and appellant contends that consequently the jury failed to find a crucial and jurisdictional element of the alleged crimes. As to the accusation of having embezzled from a federally insured institution, appellant is entirely correct: it was neither proved nor found.

The argument advanced by the panel opinion that Mrs. Hand knew what she was charged with, "* * * embezzling funds from her named employer * * *"—and hence the "plain and concise statement" requirement of Rule 7(c), F.R. Crim. P. was satisfied—is wide of the mark.

Mrs. Hand was not on trial in a state court, where general allegations of embezzlement from a specified employer might suffice. Instead she was on trial in a court whose jurisdiction was limited to trying violations of federal laws, here specifically Title 18, U.S.C., Section 657. Jurisdiction, was affirmatively appearing from the face of the indictment, was simply never present.

As to the second proposition, that regardless of the shortcomings of the charge, as laid in the indictment, somehow a case was made out: in addition to the quotations, *supra*, from Part II of the panel opinion, I turn to an additional statement in that opinion, 497 F.2d at 933:

> It is undisputed that the United States offered no proof that the deposits of the Union were insured in the manner charged.

That was enough to end the matter.

As to the search point covered by Judge Dyer's dissent, the majority labors mightily to salvage a patently unconstitutional search and seizure. This *ad hoc* approach serves the purpose, in addition to preserving Mrs. Hand's conviction, of approving unbelievably sloppy police work.

As to Part II, to which this dissent is directed, incredibly inefficient and insufficient pleading and proof by a United States Attorney, or perhaps his assistant, while certainly not approved, is not condemned either. I do not perceive a valid reason for this court to rescue this gentleman.

That Mrs. Hand may escape from punishment is overshadowed here by more important considerations. Poor performance by investigators and prosecutors should not pass muster unscathed and uncensured on the basis of an *ad hominem* approach that guilt of some offense is clear from the record. This misconceives our prime function of reviewing errors of law. I suggest also that occasional merited criticism of police and prosecutors is beneficial to the advancement of good order and discipline.

Efficient crime detection and punishment is not advanced but is retarded when we place precedents such as today's in the books. It will return to vex us on another day.

With deference, I dissent from the majority opinion on the basis of these views as to Part II, as well as with respect to the unconstitutional search and seizure, so convincingly explicated by Judge Dyer.



## DENIAL OF PETITION FOR REHEARING

(Opinion July 28, 1975, 5 Cir., 1975, 516 F.2d 472)

(Caption Omitted)

Before BROWN, Chief Judge, and WISDOM, GEWIN, BELL, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, SIMPSON, MORGAN, CLARK, RONEY and GEE, Circuit Judges.

PER CURIAM:

It is ordered that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

WISDOM, THORNBERRY, GOLDBERG, DYER, SIMPSON and LEWIS R. MORGAN, Circuit Judges, would grant the petition for rehearing for the reasons stated in Judge DYER's dissent to Part I of the opinion of the court en banc, GODBOLD, Circuit Judge, would do so for the reasons stated in his separate dissent to Part I of that opinion, and DYER and SIMPSON, Circuit Judges, would do so for the additional reasons stated in Judge SIMPSON's dissent to Part II thereof.

## JUDGMENT ON REHEARING EN BANC

(Caption Omitted)

This cause came on to be heard on defendant-appellant's petition for rehearing en banc without oral argument;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed by the Court en banc.

July 28, 1975

DYER, Circuit Judge, with whom WISDOM, THORNBERRY, GOLDBERG, SIMPSON and MORGAN, Circuit Judges, join, dissenting as to Part I.

GODBOLD, Circuit Judge, dissenting as to Part I.

SIMPSON, Circuit Judge, with whom DYER, Circuit Judge, joins dissenting as to Part II.

Issued as Mandate:



## INDICTMENT

(Caption Omitted)

THE GRAND JURY CHARGES:

### COUNT I

That on or about the 25th day of July, 1968, in the Houston Division of the Southern District of Texas, and within the jurisdiction of this Court, one KATHRYN FRANCES HAND, being an employee of the ILA 1351, Federal Credit Union, Houston, Texas, the deposits of which Credit Union were then and there insured by the National Credit Union Administration, did knowingly and with intent to injure and defraud the said ILA 1351, Federal Credit Union at Houston, Texas, embezzle certain monies of the said Credit Union, which had therefore been entrusted to the care and custody of the said KATHRYN FRANCES HAND by reason of her position as an employee of said Credit Union, in the amount of One Thousand One Hundred Ninety Four and 94/100 ($1,194.94) Dollars, more or less.

(Violation: Title 18, United States Code, Section 657)

### COUNT II

That on or about the 30th day of April, 1969, in the Houston Division of the Southern District of Texas, and within the jurisdiction of this Court, one KATHRYN FRANCES HAND, being an employee of the ILA 1351, Federal Credit Union, Houston, Texas, the deposits of which Credit Union were then and there insured by the National Credit Union Administration, did knowingly

and with intent to injure and defraud the said ILA 1351, Federal Credit Union at Houston, Texas, embezzle certain monies of the said Credit Union which had therefore been entrusted to the care and custody of the said KATHRYN FRANCES HAND by reason of her position as an employee of said Credit Union, in the amount of One Thousand Nine Hundred Seventy-Five and 32/100 ($1,975.32) Dollars, more or less.

(Violation: Title 18, United States Code, Section 657)

COUNT III

That on or about the 27th day of June, 1969, in the Houston Division of the Southern District of Texas, and within the jurisdiction of this Court, one KATHRYN FRANCES HAND, being an employee of the ILA 1351, Federal Credit Union, Houston, Texas, the deposits of which Credit Union were then and there insured by the National Credit Union Administration, did knowingly and with intent to injure and defraud the said ILA 1351, Federal Credit Union at Houston, Texas, embezzle certain monies of the said Credit Union, which had therefore been entrusted to the care and custody of the said KATHRYN FRANCES HAND by reason of her position as an employee of said Credit Union, in the amount of Three Thousand Six Hundred Thirteen and 67/100 ($3,613.67) Dollars, more or less.

(Violation: Title 18, United States Code, Section 657)

COUNT IV

That on or about the 27th day of June, 1969, in the Houston Division of the Southern District of Texas, and within the jurisdiction of this Court, one KATHRYN



FRANCES HAND, being an employee of the ILA 1351, Federal Credit Union, Houston, Texas, the deposits of which Credit Union were then and there insured by the National Credit Union Administration, did knowingly and with intent to injure and defraud the said ILA 1351, Federal Credit Union at Houston, Texas, embezzle certain monies of the said Credit Union, which had therefore been entrusted to the care and custody of the said KATHRYN FRANCES HAND by reason of her position as an employee of said Credit Union, in the amount of Two Thousand and 25/100 ($2,000.25) Dollars, more or less.

(Violation: Title 18, United States Code, Section 657)

COUNT V

That on or about the 10th day of March, 1970, in the Houston Division of the Southern District of Texas, and within the jurisdiction of this Court, one KATHRYN FRANCES HAND, being an employee of ILA 1351, Federal Credit Union, Houston, Texas, the deposits of which Credit Union were then and there insured by the National Credit Union Administration, did knowingly and with intent to injure and defraud the said ILA 1351, Federal Credit Union at Houston, Texas, embezzle certain monies of the said Credit Union, which had therefore been entrusted to the care and custody of the said KATHRYN FRANCES HAND by reason of her position as an employee of said Credit Union, in the amount of One Thousand One Hundred Fourteen and 39/100 ($1,-114.39) Dollars, more or less.

(Violation: Title 18, United States Code, Section 657)

## COUNT VI

That on or about the 10th day of July, 1970, in the Houston Division of the Southern District of Texas, and within the jurisdiction of this Court, one KATHRYN FRANCES HAND, being an employee of the ILA 1351, Federal Credit Union, Houston, Texas, the deposits of which Credit Union were then and there insured by the National Credit Union Administration, did knowingly and with intent to injure and defraud the said ILA 1351, Federal Credit Union at Houston, Texas, embezzle certain monies of the said Credit Union, which had therefore been entrusted to the care and custody of the said KATHRYN FRANCES HAND by reason of her position as an employee of said Credit Union, in the amount of One Thousand One Hundred one and 49/100 ($1,-101.49) Dollars, more or less.

(Violation: Title 18, United States Code, Section 657)

## COUNT VII

That on or about the 23rd day of October, 1970, in the Houston Division of the Southern District of Texas, and within the jurisdiction of this Court, one KATHRYN FRANCES HAND, being an employee of the ILA 1351, Federal Credit Union, Houston, Texas, the deposits of which Credit Union were then and there insured by the National Credit Union Administration, did knowingly and with intent to injure and defraud the said ILA 1351, Federal Credit Union at Houston, Texas, embezzle certain monies of the said Credit Union, which had therefore been entrusted to the care and custody of the said KATHRYN FRANCES HAND by reason of her position as an employee of said Credit Union, in the amount of



One Thousand One Hundred Seventy Five and 25/100 ($1,175.25) Dollars, more or less.

(Violation: Title 18, United States Code, Section 657)

## COUNT VIII

That on or about the 23rd day of October, 1970, in the Houston Division of the Southern District of Texas, and within the jurisdiction of this Court, one KATHRYN FRANCES HAND, being an employee of the ILA 1351, Federal Credit Union, Houston, Texas, the deposits of which Credit Union were then and there insured by the National Credit Union administration, did knowingly and with intent to injure and defraud the said ILA 1351, Federal Credit Union at Houston, Texas, embezzle certain monies of the said Credit Union, which had therefore been entrusted to the care and custody of the said KATHRYN FRANCES HAND by reason of her position as an employee of said Credit Union, in the amount of One Thousand One Hundred Seventy Five and 00/100 ($1,175.00) Dollars, more or less.

(Violation: Title 18, United States Code, Section 657)

## COUNT IX

That on or about the 27th day of October 1970, in the Houston Division of the Southern District of Texas, and within the jurisdiction of this Court, one KATHRYN FRANCES HAND, being an employee of the ILA 1351, Federal Credit Union, Houston, Texas, the deposits of which Credit Union were then and there insured by the National Credit Union Administration, did knowingly and with intent to injure and defraud the said ILA 1351,

Federal Credit Union at Houston, Texas, embezzle certain monies of the said Credit Union, which had therefore been entrusted to the care and custody of the said KATHRYN FRANCES HAND by reason of her position as an employee of said Credit Union, in the amount of One Thousand Five Hundred Forty and 00/100 ($1,540.00) Dollars, more or less.

(Violation: Title 18, United States Code, Section 657)

COUNT X

That on or about the 22nd day of January, 1971, in the Houston Division of the Southern District of Texas, and within the jurisdiction of this Court, one KATHRYN FRANCES HAND, being an employee of the ILA 1351, Federal Credit Union, Houston, Texas, the deposits of which Credit Union were then and there insured by the National Credit Union Administration, did knowingly and with intent to injure and defraud the said ILA 1351, Federal Credit Union at Houston, Texas, embezzle certain monies of the said Credit Union, which had therefore been entrusted to the care and custody of the said KATHRYN FRANCES HAND by reason of her position as an employee of said Credit Union, in the amount of One Thousand and 00/100 ($1,000.00) Dollars, more or less.

(Violation: Title 18, United States Code, Section 657)

No. 75-621

# In the Supreme Court of the United States

OCTOBER TERM, 1975

KATHRYN FRANCES HAND, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
*Solicitor General,*
*Department of Justice,*
*Washington, D.C. 20530.*

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# In the Supreme Court of the United States

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---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

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**MEMORANDUM FOR THE UNITED STATES IN OPPOSITION**

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Petitioner contends that evidence introduced at her embezzlement trial was the product of an unreasonable search, by a federal credit union examiner, of purses left by petitioner at the credit union office where she was the manager. She also argues that the indictment failed to allege, and the district court failed to instruct the jury on, the jurisdictional element of the embezzlement offense.

After a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted on ten counts of embezzling the funds of a federal credit union, in violation of 18 U.S.C. 657. She was sentenced to concurrent terms of four years' imprisonment on each count. A panel of the court of appeals affirmed (Pet. App. 1a-13a; 497 F. 2d 929). After rehearing *en banc*, a divided full court also affirmed, adopting portions of the panel's opinion (Pet. App. 14a-30a; 516 F. 2d 472).

Petitioner was the bookkeeper and office manager of the International Longshoremen's Association Local 1351 Federal Credit Union in Houston, Texas (C.A. App. 7, 10, 13).[1] She had "almost total control of all facets of the operation" (*id.* at 59). In April 1971, during an annual examination of the credit union, John Hale, a senior credit union examiner employed by the National Credit Union Administration, discovered a cash shortage of $30 that could not be accounted for (*id.* at 27-28, 33-34). He also found that interest income on the credit union's outstanding loans appeared insufficient (*id.* at 35). After reviewing individual ledger cards to determine the reason for that insufficiency, Hale discovered what appeared to be delinquent loans amounting to about $22,000 (*ibid.*).

When Hale asked petitioner why these loans had not been reported as delinquent, she stated that the loans had been refinanced and that the extension agreements evidencing the refinancings were not in the file because the credit union's loan officer still had possession of them (*id.* at 35-36). On the next day, petitioner gave Hale several extension agreements, but "four of them had suspicious signatures" that "didn't appear to be authentic" (*id.* at 36). On Hale's inquiry, one of the persons whose purported signature appeared on an extension agreement produced a canceled check and a cash receipt voucher showing that the loan had in fact been paid (*id.* at 37). The payment had not been credited to the borrower's account (*ibid.*).

Hale advised the credit union of his findings and suggested that petitioner be suspended pending a thorough investigation and a verification of all accounts (C.A. App. 37). Petitioner was suspended on April 8, 1971 (*ibid.*).

On April 9, petitioner told Hale by telephone that several missing credit union ledger cards had mysteriously ap-

[1]"C.A. App." refers to the appendix in the court of appeals, a copy of which has been lodged with the Clerk of this Court.



peared that morning on her front porch (*id.* at 38-40). Hale, accompanied by the credit union's president, went to petitioner's home, where she gave Hale the ledger cards. Most of the cards had been torn (*id.* at 39).

In another telephone call later that day, petitioner admitted to Hale that she had been concealing cash shortages for two and a half years (*id.* at 40). Although she denied knowing the cause of the shortages, she said she was willing to make some restitution (*ibid.*).

Petitioner also indicated that she planned to send someone to the credit union to retrieve several of her purses and other personal belongings (*id.* at 41). As Hale gathered up petitioner's personal property, he saw some purses on top of and inside an unlocked file cabinet (*id.* at 41, 44-45). He testified that he opened them "to determine if they were hers" (*id.* at 41, 46). Inside the purses, Hale found credit cards and bills containing petitioner's or her husband's name (*id.* at 41). He also found 175 cash received vouchers totaling about $41,000, most of which were initialed by petitioner as receiving teller and about $35,000 of which had not been posted to the members' share and loan ledgers (*id.* at 49, 85, 101-103; Pet. App. 17a). The vouchers were introduced in evidence at petitioner's trial over her objection (C.A. App. 106-107).

A certified public accountant who subsequently examined the credit union's books and records, including the vouchers found by Hale and the ledger cards given to Hale by petitioner, testified that the books and records revealed discrepancies and irregularities attributable to a procedure known as "lapping" (*id.* at 90-91)—"using later cash receipts to match earlier deposits and relying on posting delay to bridge the gap between what should have been in the coffers and what was" (Pet. App. 14a).

1. Petitioner contends (Pet. 6-10) that the vouchers should have been suppressed as the fruit of a warrantless,

and therefore unlawful, search of the purses she had left at the credit union office. Petitioner did not file a pretrial motion to suppress the evidence; she first challenged the lawfulness of Hale's conduct at trial in the midst of his testimony (C.A. App. 41-42). Petitioner's attorney told the district court that the failure to file a pretrial suppression motion "was deliberate" (*id.* at 42). "[T]his is only one small aspect of the entire case," counsel stated, "and whether we are overruled on this, or not, I'm sure it's not going to jeopardize the government's case" (*ibid.*). The matter was raised at trial, according to counsel, because "we do want to protect our record" (*ibid.*).

Under the new provisions of Rule 12(c) and (f), Fed. R. Crim. P., a motion to suppress evidence must be made prior to trial, and a failure to do so constitutes a waiver of the claim. While those provisions did not become effective until December 1, 1975, they merely codified prior decisional law. See Advisory Committee Note to Rule 12; 8A Moore's *Federal Practice* §41.08[1] (1975); 3 Wright, *Federal Practice and Procedure: Criminal* §673, pp. 111-115 (1969).

The district court had discretion to grant relief from such a waiver. But the district court here, while permitting petitioner to ask Hale several questions out of the jury's presence (C.A. App. 44-45), did not expressly relieve petitioner of her waiver. Indeed, such relief would not likely be deemed appropriate when the failure to file a pretrial motion was admittedly a deliberate tactical decision and when counsel openly acknowledged that a suppression order would not "jeopardize the government's case" (*id.* at 42).

Even assuming that the district court's denial of petitioner's tardy motion was a ruling on the merits that implicitly relieved her of the consequences of her waiver, and that her claim is therefore properly before this Court,



her contention was correctly rejected on the merits by the court of appeals and does not warrant further review.

First, although the court of appeals assumed *arguendo* that Hale opened the purses to look for incriminating evidence (see Pet. App. 17a), his uncontradicted testimony was that he opened them only "to determine if they were hers" (C.A. App. 41). Having been told that petitioner was sending someone to pick up her purses and personal belongings, Hale could properly open a purse "left about the office * * * where he was authorized to be" (Pet. App. 18a-19a) in order to see whether it belonged to petitioner. He was not required to seek a warrant before ascertaining whether petitioner owned and was entitled to remove the purses.

Second, even if Hale had in fact been looking for evidence, a warrantless search of the purses would have been proper. The court of appeals found — and petitioner apparently does not dispute the finding — that "[t]here was probable cause to believe that [the purses] contained evidence" (Pet. App. 20a).[2] When petitioner announced her intention to retrieve her purses, Hale had only two alternatives short of foregoing altogether the opportunity to make an effective search of the purses. He could have either searched them immediately without a search warrant or seized and held them without a warrant for as long a period as was necessary to notify law enforcement officers and request them to obtain a search warrant. Petitioner's argument, as we understand it, is that Hale

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[2] "Probable cause existed to believe that [petitioner] had previously concealed and removed and might again conceal or remove records, and the purses were a likely vehicle for either action. Hale would have been remiss in his duty had he permitted such containers and their contents to be taken away from the accounting files without determining that they were not being so used" (Pet. App. 18a).

should have chosen the latter alternative because that would have occasioned a lesser intrusion than an immediate search.

But here, as in *Chambers* v. *Maroney*, 399 U.S. 42, 51-52, "which is the 'greater' and which the 'lesser' intrusion is itself a debatable question and the answer may depend on a variety of circumstances." In the circumstances of this case — including the fact that the purses had been left by petitioner in places to which she did not have exclusive access, so that her usual expectation of privacy with respect to their contents was necessarily reduced (Pet. App. 18a-19a) — the court of appeals correctly found that "the lesser intrusion was to check the purses for Union documents and, if none were found, to release them without more ado" (*id.* at 19a).

In any event, we agree with the court of appeals that this Court's analysis in *Chambers* is applicable here by analogy. The Court there saw "no difference [for constitutional purposes] between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant" (399 U.S. at 52). That the movable objects here were purses rather than automobiles should not lead to a different result — at least on the facts of this case. Since Hale had probable cause for the search of the purses, and since the purses did not "imply privacy" (Pet. App. 18a) to the extent that one would ordinarily expect, either of Hale's alternative courses would have been reasonable under the Fourth Amendment (see *ibid.*).

Third, even if Hale's actions were deemed an unlawful search, it does not necessarily follow that suppression would be required. Although the court of appeals was willing to "[a]ssum[e] that Hale was the sort of person



to whose searches and seizures the Fourth Amendment applies" (Pet. App. 15a), he was not within the class of officials whose conduct is ordinarily thought to be affected by application of the exclusionary rule.

"[T]he rule's prime purpose is to deter future unlawful *police* conduct" (*United States* v. *Calandra*, 414 U.S. 338, 347; emphasis added). Hale was not a criminal law enforcement officer but a federal credit union examiner whose basic duty was to conduct annual audits and examinations of the books and records of federal credit unions (C.A. App. 27-28). See 12 U.S.C. 1756, 1766(d). It seems to us wholly unreasonable to suppose that, if this Court were to suppress the evidence discovered by Hale, such action would be effective to deter other accountants employed by government agencies from similar actions in the unlikely event such an employee is again confronted with a similar situation. The criminal justice system would thus incur the heavy cost of exclusion of relevant evidence with no corresponding gain to the interest in protecting individual privacy from unauthorized official intrusion.

But even if application of the exclusionary rule would be appropriate in some cases involving an unlawful search by a federal credit union examiner, this is not such a case. In the circumstances here, Hale's conduct, if unreasonable at all, was only marginally so, and thus it is appropriate to take into account the fact that he was an auditor and not a police officer. "As with any remedial device, the application of the [exclusionary] rule has been restricted to those areas where its remedial objectives are thought most efficaciously served" (*United States* v. *Calandra*, *supra*, 414 U.S. at 348). Application of the rule in this case would not significantly serve "its broad deterrent purpose" (*ibid.*). See also *United States* v. *Peltier*, 422 U.S. 531, 538-539.

2. Under 18 U.S.C. 657, it is a criminal offense for an employee of any "lending, * * * credit or savings and loan corporation or association authorized or acting under the laws of the United States or any institution the accounts of which are insured by * * * *the Administrator of the National Credit Union Administration*" to embezzle funds belonging to the institution (emphasis added). The italicized phrase was added to the statute in October 1970 (84 Stat. 1016).

The indictment in this case charged in ten substantially similar counts that, on certain specified dates, petitioner, "being an employee of the ILA 1351, Federal Credit Union, Houston, Texas, the deposits of which Credit Union were then and there insured by the National Credit Union Administration," embezzled funds from the credit union in violation of 18 U.S.C. 657 (Pet. App. 7a-8a, 33a-38a). Counts I-VI alleged acts of embezzlement on dates prior to the October 1970 amendment to 18 U.S.C. 657; counts VII-X alleged acts of embezzlement on dates subsequent to that amendment.

At trial the government did not show that the credit union's accounts were insured by the Administrator of the National Credit Union Administration. It did introduce in evidence the credit union's federal charter (C.A. App. 3-4), and the current manager of the credit union testified that it was operating under federal law (*id.* at 5). The district court instructed the jury that one essential element of the embezzlement offense was "[t]hat the defendant was the servant and employee of the ILA 1351, Federal Credit Union as alleged" (*id.* at 175).

Petitioner contends that the indictment's only jurisdictional allegation was that the credit union's accounts were federally insured. She argues that federal insurance did not satisfy the jurisdictional requirements of the statute prior to the October 1970 amendment, which became



effective after the acts alleged in counts I-VI (Pet. 11-12), that there was, in any event, no evidence to support the allegation that the credit union's accounts were federally insured (Pet. 12-14), and that the district court failed to instruct the jury concerning the essential jurisdictional element of the offense (Pet. 14-15). These claims, as the court of appeals noted, were presented for the first time on appeal (Pet. App. 10a-11a, 23a).

The *en banc* court of appeals, adopting the panel's opinion on this issue, correctly rejected petitioner's premise. The court held, though "[n]ot without difficulty" (*id.* at 11a), that the indictment "alleged two jurisdictional bases [*i.e.*, federal insurance and federal incorporation], either of which would do, and proved one of them" (*id.* at 10a). The other was mere "[s]urplusage [which], though subject to being stricken on defendant's motion, does not vitiate an indictment" (*ibid.*). "[A]s a matter of criminal pleading, * * * jurisdiction [was] sufficiently alleged, against objection made for the first time on appeal, by the simple assertion that defendant embezzled from 'the X National Bank' or 'the Y Federal Credit Union' " (*id.* at 10a-11a).

The court of appeals reasoned that the indictment gave petitioner "fair notice" — "she well knew what she was accused of" — and was sufficient "to protect her from further jeopardy" (*id.* at 11a). The court further stated (*id.* at 12a):

> [A common-sense] reading indicates that an entity styled a "Federal Credit Union" is at least very likely to be a federal credit union, whether or not realleged to be such in lower case. Nor need there be fear in this case, such as was expressed in *Stirone* v. *United States*, 361 U.S. 212, * * * that the grand jury which returned this indictment did not mean

> to charge the offense of which [petitioner] was convicted. No prejudice to the substantial rights of [petitioner] appears from the sketchiness of the pleading, and hence it was not fatally defective.

In its *en banc* opinion, the court "emphasize[d] that we hold no more than that this indictment withstands an objection made for the first time on appeal, where it is apparent that [petitioner's] substantial rights were not affected" (*id.* at 22a-23a).

Although petitioner claims that the district court's instructions did not properly submit the jurisdictional element to the jury, she made no objection to the instructions at the time they were delivered (C.A. App. 183), and she may not now complain of their form. Rule 30, Fed. R. Crim. P. In any event, the court's instruction, like the indictment, used the phrase federal credit union (C.A. App. 175). Although we believe it would have been better to spell out in clearer fashion the jurisdictional facts that the jury was required to find, we also believe that the instruction was sufficient in the circumstances of this case to put the jurisdictional element before the jury. Any other result would needlessly exalt form over substance and burden the courts with retrials not necessary to protect substantial rights of defendants.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
*Solicitor General.*

FEBRUARY 1976.

DOJ-1976-02